

# COURTHOUSE NEWS

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A Summary of Topical Highlights from decisions of the  
U.S. District Court for the District of Oregon  
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## Product Liability

An estate filed an action against the manufacturer of an industrial lift device claiming that the defendant's negligent design and failure to warn resulted in a fatal accident. Defendant moved for summary judgment against the products liability claim based upon O.R.S. 30.915. Defendant argued that fact that the decedent's employer had modified the lift controls and essentially neutered defendant's safety features. Defendant claimed that but for the employer's modification, the accident would not have occurred.

Judge Dennis J. Hubel first held that the product modification defense set forth in O.R.S. 30.915 was in the nature of an affirmative defense and thus, the burden of establishing the elements of that offense rest with the defendant. The court expressly rejected the defendant's claim that the plaintiff should have to show, as part of its prima facie case, that the modification was not essential to the cause of death. Judge Hubel

reasoned that such a result would be contrary to legislative intent. The court concluded that plaintiff's proffered expert testimony regarding the cause of the accident and the role any product modification played in that accident was sufficient to create a jury question.

The defendant also sought summary judgment against plaintiff's common law negligence claim, arguing that the product liability statutes provided an exclusive remedy. Judge Hubel also rejected this argument, finding no legal support for a requirement that a negligence action cannot co-exist with a viable products liability claim. Ensley v. Strato-Lift, Inc., CV 00-269-HU (Opinion, Oct. 6, 2000 - 20 pages).

Plaintiff's Counsel:

Jeffrey Bowersox

Defense Counsel:

Roger Stroup

## Patent/Jurisdiction

Judge Anna J. Brown denied a defense motion to dismiss for lack of personal jurisdiction in an action involving claims of patent infringement relative to a digital

watermarking process. In so holding, Judge Brown refused to consider the forum related contacts of defendant's third party licensees. However, the court found that the defendant had purposefully availed itself of doing business in the Oregon forum through the execution of a contract with Intel, an offer to sell to another Oregon company, maintenance of a passive website available to Oregon residents and defendant's participation in international industry-wide groups which included Oregon members. The court considered the Intel contract, even though the contract was entered into and largely performed at Intel's Arizona facility, because it was signed and negotiated on behalf of Intel, Hillsboro. The court also considered, for a limited purpose, the fact that the defendant entered into a significant contract with an Oregon company immediately after the filing of the complaint. The court found that negotiations and the ultimate contract were further evidence of the defendant's intent to participate in the Oregon market. Finally, Judge Brown

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denied an alternative motion to transfer venue, finding convenience factors a wash. Digimarc Corp. v. Verance Corp., CV 00-344-BR (Opinion, October, 2000).

Plaintiff's Counsel:

James Geringer, Jeff Love

Defense Counsel:

Stephen Swinton,

Michael Simon

## Sanctions

In a civil action, Judge Anna Brown recently entered an order of monetary sanctions against an attorney who filed a number of unauthenticated documents with a summary judgment response and then failed to correct the error after opposing counsel brought the deficiency to his attention. Judge Brown found that defense counsel should have to pay the "reasonable and necessary attorney's fees" plaintiff incurred in filing the motion to strike the documents.

The court also imposed a sanction of \$3500 against the defense attorney for failing to file documents produced pursuant to a protective order under seal. Judge Brown rejected plaintiff's argument that the documents should not have been considered confidential in the first place, noting that defendant waived such an argument by agreeing to the terms of the order.

Finally, the court denied a

motion to strike a defense witnesses' proffered testimony with the caveat that the witness must make himself available for cross-examination. Plaintiff sought the relief based upon the witness' refusal to answer questions following his direct testimony. The Hearst Corporation v. Oregon Worsted Co., CV 99-640-BR (Order, Oct. 21, 2000).

Plaintiff's Counsel:

Michael Ratoza

Defense Counsel: Martin Jacqua

## Procedure

Judge Ann Aiken granted a foreign defendant's motion for relief from default pursuant to Rule 55(c). The court found a genuine miscommunication between counsel such that the defendant could not be charged with culpable conduct. The court further found that the defendant presented a meritorious defense and that plaintiff failed to demonstrate prejudice.

The court also denied plaintiff's request for fees incurred in having to formally serve the defendant under the Hague Convention. Judge Aiken held that Rule 4's provision for service fees was inapplicable to a foreign corporation that does no business in the United States.

Pendergraft v. Baja Bulk Carriers, S.A., CV 99-254-AA (Opinion, Oct., 2000).

Plaintiff's Counsel:

Jeffrey Mutnick

Defense Counsel:

Craig Murphy

/ Judge Malcolm F. Marsh granted a defense motion for judgment on the pleadings and dismissed a negligence action as untimely. Plaintiff filed the action within two years of the accident, but failed to seek appointment of a personal representative for the estate of the deceased defendant within the two year statute of limitations period. Goodman v. Doe, CV 00-627-MA (Order, Nov. 1, 2000).

Plaintiff's Counsel: Jeff Long

Defense Counsel: Ed Sears

## Social Security

Judge Robert E. Jones remanded a social security appeal based upon an ALJ's failure to consider two of four mental health exams. The court further ordered the ALJ to reconsider its determination that plaintiff lacked credibility in light of the additional reports. Finally, the court refused to remand for an immediate award of benefits because the record was incomplete and because the ALJ should have obtained a vocational expert's testimony. Garner v. SSA, CV 99-6246-JO (Oct. 2000).

Plaintiff's Counsel: Judith Lerner

Defense Counsel: Bill Youngman